LAUGHLIN ENVIRONMENTAL, INC.

CONTRACT NO. V101DC-0065 **VABCA-5364-5368**

VA MEDICAL CENTER
WACO, TEXAS

Larry Thyssen, Vice-President, Laughlin Environmental, Inc., Houston, Texas, for the Appellant.

Patrick J. LaMoure, Esq., Trial Attorney; ***Charlma O. Jones, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

Laughlin Environmental, Inc. (LEI or Subcontractor) appealed several claims in connection with Contract No. V101DC-0065 for which it said the contracting officer had "failed to issue a decision." These appeals were docketed as VABCA Nos. 5364-68. The record indicated that the contract in question was between the Department of Veterans Affairs (VA or Government) and Young Enterprises, Inc. (Young or Prime Contractor). Because there was no indication that the claims were ever sponsored or submitted by Young, the Board issued an ORDER TO SHOW CAUSE to why the appeals filed by LEI should not be dismissed for lack of jurisdiction. LEI has not responded to the Board's Order.

FINDINGS OF FACT

Young was the Prime Contractor in a contract to renovate Building No. 4 and Building No. 92 at the VA Medical Center located in Waco, Texas (Contract No. V101DC-0065). LEI was a subcontractor to Young. On April 15, 1994, the Subcontractor wrote to the Prime Contractor concerning "Change Order No. 3" with respect to "VA Waco Window Restoration, Buildings 4 and 42." LEI sought a total of $22,811.26 for "costs incurred due to the time given to mobilize" the project. LEI said that "pricing was being requested up to the date of March 18, 1994," and that when it received "the verbal notice to proceed" it had been given only until March 21 to mobilize which was "not adequate time to mobilize a job of such size and complexity."

A second letter to the Prime Contractor, also dated April 15, 1994, referenced as "Lead Paint Removal, Change Order No. 4," sought $5,037.82 for "costs associated with work being performed in Containment No. 1." LEI complained of "adjacent construction activities" which "impacted" its schedule by one day and asked Young for the "cost associated with this delay."

Finally, a third letter addressed to the Prime Contractor written the same day and referred to as "Change Order No. 5," said that LEI had to stop "preparation due to other trades materials and equipment being stored against the exterior wall of the basement level." The Subcontractor informed Young that this situation had impacted its schedule by two days and attached a breakdown of costs incurred due to "work slow-down beyond

our control" which it said amounted to $3,029.77.

Thereafter on June 28, 1994, LEI wrote to Young referencing "Change # 8" concerning "Window Abatement Modified Specification" seeking $40,127.01 for "differing site conditions." LEI informed the Prime Contractor that after the "walk-through" of Bldg. No. 4 on June 2, 1994, everyone "came to the conclusion that additional bondo and restoration of the windows will be necessary to bring them to an acceptable level to meet the VA's requirements." LEI said that the existing "window imperfections" were "unforeseeable until after the abatement was performed."

The record is devoid of what response, if any, that Young made to the Subcontractor with respect to any of these requests for additional compensation. The record does disclose that almost two years later on May 30, 1996,Young, LEI and Larry Erwin, the VA's Senior Resident Engineer (SRE) "met to negotiate [Change Order] # 3." In a letter to the Prime Contractor, dated June 11, 1996, the SRE enclosed notes of the May 30th meeting in which he covered many of the requests by LEI for additional compensation which had been the subject of earlier correspondence from the Subcontractor to Young. Specifically, with respect to LEI's complaint about inadequate mobilization time, SRE Erwin characterized this as a "difference between the contractor and subcontractor" and asserted that "[t]he Government has no knowledge of the contract between YEI [Young] and Laughlin [LEI]." Erwin disclaimed any VA responsibility concerning LEI's requests and informed Young that if it had any "questions or comments" to contact his office.

On January 22, 1997, LEI wrote directly to the Senior Resident Engineer, with a copy to Young and the VA Contracting Officer, requesting $17,405 in connection with "Change Order # 7," for "compensation for general liability insurance cost inadvertently omitted from our cost proposal." Again, the record is devoid of any response to this request.

Six days later on January 28th, LEI wrote three separate letters to SRE Erwin with copies to Young and to the Contracting Officer. In the first letter, concerning the initial mobilization claim of approximately $23,000, LEI made reference to the Senior Resident Engineer's June 11, 1996 letter to Young and asserted that it could as Subcontractor "prosecute on its own behalf an appeal from a Contracting Officer's final decision," and further, could without proof of sponsorship by a prime contractor file an appeal under the *Contract Disputes Act* because "sponsorship is evidentiary rather than a jurisdictional matter."

In its second letter of the same date, LEI sought payment from the VA with respect to its previous April, 1994 request to the Prime Contractor for "Change Orders Nos. 4 and 5." LEI asserted that Young and the other contractors were continuing performance at the direction of the Contracting Officer which "directly interfered with LEI's performance" thus rendering the interruption of work a "direct result of the Contracting Officer's actions." In its third letter dated January 28, 1997, LEI sought compensation for its "Change Order #8" differing site condition about which it had notified Young in April, 1994.

On April 4, 1997, LEI wrote directly to the Contracting Officer in separate letters

requesting a "Contracting Officers Decision" for "our change order[s]" 3, 4, 5, and 8. The Subcontractor added that "since the contracting officer has had all the information about this change for a long time, we request the decision[s] within 10 days."

Thereafter on June 12, 1997, LEI wrote to this Board asserting that "Laughlin Environmental, Inc. (LEI) is making an appeal . . . for the changes as noted below," adding that "[t]he Contracting Officer has failed to issue a decision" on the following claims:

C/O # 3 Amount $22,811
C/O # 4 Amount $ 5,037
C/O # 5 Amount $ 3,029
C/O # 7 Amount $17,405
C/O # 8 Amount $40,127

In docketing these appeals as VABCA Nos. 5364-68, we noted that we saw no evidence in the Notice of Appeal or the documents attached thereto that the claims were ever submitted or "sponsored" by Young Enterprises, Inc., the Prime Contractor in the above-captioned contract. Accordingly, Laughlin Environmental, Inc., was ordered to Show Cause why these appeals should not be dismissed for lack of jurisdiction, pursuant to Board Rule 5, because Laughlin Environmental, Inc., is not a "contractor" as defined by the *Contract Disputes Act of 1978*, 41 U.S.C. §§ 601-613. No response was received from the subcontractor, nor was there any communication from the Prime Contractor.

DISCUSSION

As previously noted, it does not appear that any of these claims were presented to the Contracting Officer by the Prime Contractor and further that the Appeals from a "failure to decide" were made directly to the Board by the subcontractor without Young's sponsorship. The *Contract Disputes Act of 1978*, 41 U.S.C. §§ 601-613, provides the statutory framework for resolving disputes between Government contractors and the Government. Section 605 (a) provides that "[a]ll claims by a contractor against the government relating to a contract . . . shall be submitted to the contracting officer for a decision." Section 601 (a) (4) defines a "contractor" as "a party to a government contract other than the government." The Federal Circuit in ***Erickson Air Crane Co. v. United States*** held, "[a] party in interest whose relationship to the case is that of the ordinary subcontractor may prosecute its claims only through, and with the consent and cooperation of, the prime, and in the prime's name." 731 F.2d 810, 813 (Fed. Cir. 1983).

"The Board lacks jurisdiction to consider appeals by a contractor not in privity of contract with the Government." ***Gormley Plumbing and Heating***, VABCA No. 3644 and 3663, 93-2 BCA ¶ 25,818 at 128,534, 93-3 BCA ¶ 26,112 at 129,786 (*citing* ***United States v. Johnson Controls, Inc.,*** 713 F.2d 1541 (Fed. Cir. 1983); ***A & A Insulation-Contractors, Inc.***, VABCA No. 2643, 87-3 BCA ¶ 20,168 at 102,080.

DECISION

For the foregoing reasons the Appeals of Laughlin Environmental, Inc. are dismissed for lack of jurisdiction, pursuant to Board Rule 5.

DATE: **September 30, 1997** _____

GUY H. MCMICHAEL III
Chief Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

WILLIAM E. THOMAS, JR.
Administrative Judge